No.

IN

SUPREME COURT OF

OCTOBER

DAVID ALLEN LOG

V

WILLIAM ABSHI

ON PETITION FOR

TO THE UNITED STATE

FOR THE SI

BRIEF IN O

PETITION FOR WR

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*Counsel of Record

Supreme Court, U.S.
FILED
AUG 25 1987
JOSEPH F. SPANIOL, JR.
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THE

THE UNITED STATES

ERM, 1987

N, Petitioner,

E, Respondent.

RIT OF CERTIORARI

S COURT OF APPEALS

TH CIRCUIT

POSITION TO

T OF CERTIORARI

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QUESTIONS PRESENTED

I.

WHETHER THE TRIAL COURT'S GIVING THE JURY A BACKGROUND EXPLANATION OF MURDER THEORY AT THE REQUEST OF PETITIONER CONSTRUCTIVELY AMENDED THE INFORMATION AND DENIED PETITIONER FAIR NOTICE OF THE CHARGE AGAINST WHICH HE WAS DEFENDING?

II.

WHETHER THE REFUSAL TO GIVE A MANSLAUGHTER INSTRUCTION WHERE THE FACTS SHOWED THE VICTIM WAS KILLED BY PETITIONER DURING A PLANNED, DELIBERATE ROBBERY WITH A LOADED GUN DEPRIVED PETITIONER OF DUE PROCESS OF LAW?

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OPINIONS BELOW

David Allen Logan, Petitioner is currently in the custody of the Michigan Department of Corrections and incarcerated at the Riverside Correctional Facility, Ionia, Michigan.

On February 27, 1975, Petitioner was tried by a jury and convicted for the August 12, 1974 first degree felony murder in the Macomb County, Michigan Circuit Court, Walter P. Cynar, Judge, as the result of his admitted killing of Nicholas Zerrilli during a robbery of Mr. Zerrilli's business, the Tasty Tim Ice Cream Company. MCLA 750.316; MSA 28.548. Petitioner was thereupon sentenced to natural life imprisonment.

The Michigan Court of Appeals thereafter reversed Petitioner's conviction with instructions to enter a judgment of guilty to second degree murder, MCLA 750.317; MSA 28.549, or, at the option of the prosecutor, a new trial on the original charges. *People* v *Logan*, No. 23808, unpublished *per curiam* opinion (August 25, 1976).

The Macomb County prosecutor thereafter elected to enter a conviction of second degree murder. Petitioner was thereafter re-sentenced to life imprisonment.

Next Petitioner filed an application for leave to appeal in the Michigan Court of Appeals, which was denied for lack of merit in the grounds presented in an unpublished order dated November 30, 1981, *People* v *Logan*, No. 59790.

Petitioner's Application for Leave to Appeal to the Michigan Supreme Court was denied in a published order, *People* v *Logan*, 414 Mich 904 (1982).

Again Petitioner filed a further delayed application for leave to appeal in the Michigan Court of Appeals, which was denied for lack of merit in the grounds presented in an unpublished order dated July 11, 1983. *People* v *Logan*, No. 69696.

Petitioner then filed an application for leave to appeal the decision of the Michigan Court of Appeals to the Michigan Supreme Court, which was denied in a published order. *People* v *Logan*, 418 Mich 968 (1984).

Petitioner then filed a petition for writ of habeas corpus in the United States District Court, Eastern District of Michigan, No. 84-CV-1945-DT. That court issued a conditional writ of habeas corpus in a Memorandum Opinion and Order dated December 19, 1984. The district court denied reconsideration on January 18, 1985.

Timely appeal of that decision was brought to the Sixth Circuit Court of Appeals. On December 9, 1985, the Court of Appeals reversed in a published *per curiam* opinion. *Logan* v *Abshire*, 778 F2d 283 (CA 6, 1985).

On April 11, 1986, the district court, pursuant to the February 7, 1986, mandate of the Court of Appeals, entered its order denying the writ of habeas corpus. At the same time, the district court returned the case to its active docket for consideration of the alternative grounds advanced by Petitioner which were not previously considered by the district court.

On August 29, 1986, the district court filed its second Memorandum Opinion and Order denying the petition for habeas corpus. *Logan* v *Abshire, II*, No. 84-CV-1945, (hereinafter Mem Op II).

On May 28, 1987, the United States Court of Appeals filed a *per curiam* opinion affirming the judgment of the district court denying the petition for writ of habeas corpus. On July 29, 1987, the judgment of the district court issued as a mandate.

JURISDICTION

Respondent agrees with Petitioner's assertion that this Court has jurisdiction to review the May 28, 1987 judgment of the United States Court of Appeals, 28 USC 1254(1).

CONSTITUTIONAL PROVISIONS, STATUTES AND COURT RULES INVOLVED

The constitutional provisions involved in this case are the Sixth and Fourteenth Amendments to the United States Constitution.

The Sixth Amendment states in pertinent part:

> "In all criminal prosecutions, the accused shall enjoy the right ... to be informed of the nature of the cause of the accusation ..."

Section One of the Fourteenth Amendment states in pertinent part:

> "[N]or shall any State deprive any person of life, liberty, or property, without due process of law; ..."

STATEMENT OF THE CASE

Nicholas Zerrilli, the owner of the Tasty Tim Ice Cream Company, (T-89) a wholesale business (T-89) worked late on the night of his 27th birthday, August 12, 1974 (T-95), at his Center Line, Michigan location. With him at work was his wife and infant son (T-89). Late that night, just as father, accompanied by his son had finished the repair of a pop machine (T-95), two men entered the building (T-97). One man walked with Mr. Zerrilli (T-97). The other walked in front of Mr. Zerrilli (T-97). The man in front wore a scarf on his face, a small, black silk, babushka (T-98), which appeared like an inverted triangle tied behind his head with eye-holes cut out (T-98). The witness, Mrs. Zerrilli, realized a holdup was occurring; she hid in the office bathroom (T-102); she heard her son, who was less than four (4) years old, screaming (T-100), she heard a man tell her son to "shut-up and i won't hurt you" (T-101). She left the bathroom and told the man who was holding her son that she was the boy's mother (T-101). This second man (T-102, 104), was tall and thin and had long stringy hair (T-102). He was wearing a black mask just like the other man (T-102). He carried an eight to ten inch double edged knife with a white plastic handle in his right hand; the knife was pointed at her (T-103). The second man said "where's the money" (T-104). Mrs. Zerrilli said "in here" referring to the bathroom (T-104). When she next looked, she saw her husband with a revolver pointed toward the rear of the building (T-106). She heard him say "hold it right there" (T-106). The second man, the man with the knife, still had her son (T-106). Mrs. Zerrilli then heard a loud blast (T-106). She looked out through the large glass office window (T-92) into the warehouse and saw a huge

cloud of smoke (T-107). She thought this was her chance to escape. She took hold of her son, entered the bathroom, closed and locked the door (T-107). She just listened (T-107). She heard rapid footsteps and running (T-108). She exited the bathroom, hid her son under the office desk (T-108), and entered the warehouse. She still thought it had been her husband who shot the gun (T-109). She turned the corner and saw her husband laying on the floor (T-109), sprawled out, face up, his mouth and eyes open (T-110). Her son came from the office (T-111). She returned to the office and called the police (T-111).

The evidence disclosed that two days later, Petitioner, accompanied by his attorney and his Aunt and Uncle, surrendered himself to the Center Line (Michigan) Police Department. He made a statement to police, which was determined to be voluntary in a pre-trial hearing. In the statement Petitioner admitted he took his father's thirty-ought-six rifle from his father's closet in order to rob Tasty Tim's. He told how he had planned the robbery for about a week. Petitioner described the robbery was planned to occur at closing time, about 10:30 at night. Petitioner described leaving the house at about 9:00 p.m. for the express purpose of robbing the Tasty Tim Ice Cream Company. He described taking the rifle and concealing it wrapped up under his coat. He and his accomplice went nowhere other than to Tasty Tim's. The two walked to the location, which took about 45 minutes. The rifle was loaded; Petitioner had loaded it before he left. Petitioner described entering the building. He told the authorities how he told Mr. Zerrilli to lie down on the ground so he could tie him up. He related the robbers wore black masks cut out of material, to disguise their identity in the robbery, and that both men wore masks. Petitioner stated he and his accomplice put the masks on just

prior to entering the business. Petitioner observed Mr. Zerrilli with a gun, pointing it at Ray (i.e. the other man). Mr. Zerrilli said "freeze"; Petitioner then stated "he [Zerrilli] was going to shoot me, so I shot him." Petitioner further indicated he was not under the influence of drugs or alcohol. The confession was read into evidence (T-186-235).

At trial, Petitioner testified that "he looked and saw him, Mr. Zerrilli, with a gun." He ran out of the office. "We shot at the same time, about the same time." He also testified on cross-examination that he took the loaded rifle to rob the place (T-352, 353); that he put the mask on just before entering the building because he was not going to carry out the robbery without the mask on (T-355-356).

Other evidence pointed to Petitioner's guilt. His palm print and fingerprints were found on the murder weapon; material found in Petitioner's home matched the material with which the masks were made and masks were found in a coat which Petitioner had stated he threw down in the area he had run through (T-170-174). The rifle was found where Petitioner told police it was discarded (T-155; 227-229).

The Petitioner, while admitting he intended to rob, claimed he was intoxicated. The trial court then instructed the jury (T-411-449). Various instructions dealing with intent and intoxication were requested by the Petitioner and were given by the court. The first stated that the jury should acquit if they found he was incapable because of intoxication of forming the requisite intent. The second was that the Petitioner should be acquitted if because of intoxication he did not possess the requisite intent. The court further instructed the jury, in explanatory fashion, on premeditated

murder. This instruction was given as part of the court's explanation of murder to the jury. The court defined murder (T-420-421) and defined the elements of first degree murder (T-421-423).

The court read the first degree murder statute (T-412), and read the information to the jury (T-411, 412).

The court explained that this case required a finding of a murder occurring in the course of a robbery and the elements necessary thereto (T-424-426).

At the jury's request, and with the approval of Petitioner's trial counsel, and over the objection of the prosecutor (T-438-442), the court again explained the first degree murder statute (T-442-448). The court specifically told the jury that unless they found that the murder in this case occurred during the course, and as a result of the robbery, then they should find Petitioner not guilty (T-447-448).

The jury found the Petitioner guilty as charged.

REASONS FOR DENYING THE WRIT

I.

THE TRIAL COURT'S GIVING THE JURY A BACKGROUND EXPLANATION OF MURDER THEORY AT THE REQUEST OF PETITIONER DID NOT CONSTRUCTIVELY AMEND THE INFORMATION AND DID NOT DENY PETITIONER OF THE RIGHT TO FAIR NOTICE OF THE CHARGES AGAINST WHICH HE WAS DEFENDING.

Petitioner contends that the trial court's instructions constructively amended the information, thus depriving Petitioner of fair notice of the charges against him.

The record reflects that it was Petitioner who sought to have the court instruct the jury on premeditation, deliberation and notice as components of first degree murder (T-410). The record reflects that Petitioner's trial counsel then stated:

> " ... and I believe the court stated that the court wasn't going to charge that, and I want that to be clear." (*Id*) (Emphasis added).

The transcript continues with the court explaining his determination to Petitioner's counsel:

> "THE COURT: No. I think you have. We have discussed it at great length in chambers.

"MR. SIEFER: Okay.

"THE COURT: I have indicated that I was going to define murder to the jury. I was not going to instruct the jury on second degree or manslaughter.

"MR. SIEFER: All right.

"THE COURT: And I am going to read the statute and I am going to define these matters that you are relating to, premeditation and malice.

"MR. SIEFER: All right."

Respondent thus respectfully suggests that, although the trial judge defined premeditation, deliberation and malice, the definitions were provided at the request of Petitioner's counsel. The instructions as a whole show the court did not instruct the jury that these were the elements of first degree murder which they must find in order to return a guilty verdict. Indeed, the instructions taken as a whole, *Mullaney* v *Wilbur*, 421 US 684 (1975), show the court specifically instructed the jury that it need not find intent to kill, but that it must find intent to rob (T-423-424). The court told the jury it had a double duty: (1) to decide if the defendant murdered Nicholas Zerr III, and (2) if the murder was committed during or while trying to commit a robbery. Thus, there are at least two reasons, why Respondent disagrees with Petitioner's claim that the trial court's instruction constructively amended the information and denied him fair notice of the charges against him.

First Respondent believes that reading the instructions as a whole shows the district court

only defined the concepts of premeditation, deliberation and malice for the jury as part of introducing the concept of the two kinds of first degree murder defined by MCL 750.316. The court did not "instruct" the jury it could find Petitioner guilty of first degree murder in this case on a theory of premeditated murder. Second, the definitions of premeditation, deliberation and malice were given with Petitioner's consent, and likely at his urging (T-410-411; 440-448). Thus Petitioner should not be heard to complain. This finding by the Michigan Court of Appeals (*People* v *Logan*, No. 23808), should be given the presumption of correctness. 28 USC 2254(d) and *Sumner* v *Mata*, 455 US 591 (1982).

In addition, there are alternative grounds for this issue to be decided. Procedurally this Sixth Amendment question was originally raised in Petitioner's appeal of right to the Michigan Court of Appeals. *People* v *Logan*, Michigan Court of Appeals No. 23808, decided August 25, 1976. When the Michigan Court of Appeals remanded that case back to the trial court for entry of a judgment of second degree murder or retrial on the original charge of first degree murder, Petitioner did not seek leave to appeal any undecided question. The Petitioner stood by and accepted the prosecutor's decision to entry of a judgment of second degree murder.

Respondent submits that by accepting a judgment of second degree murder without objections, Petitioner waived the non-jurisdictional claims arising out of the plea, just as a state criminal defendant who pleads guilty may only attack the voluntary and intelligent nature of his plea, Petitioner in this case should be deemed to have waived this claim of an instructional error. See generally, *Tollett* v *Henderson*, 411 US 258 (1973). When he took a further appeal to the Michigan

Court of Appeals and raised this issue again (Michigan Court of Appeals No. 59790, 69696 and Michigan Supreme Court No. 72197) the Macomb County Prosecutor relied on the law of the case doctrine,[1] arguing that Michigan law prohibits a legal question already raised in one appeal from being raised again in a subsequent appeal after proceedings on remand. *People* v *Jones*, 394 Mich 434 (1975); *People* v *Drew*, 83 Mich App 57 (1978); *People* v *Paintman*, 92 Mich App 412 (1979); *People* v *Hamm*, 100 Mich App 429, 438 (1980); *People* v *Prophet*, 101 Mich App 618, 625 (1980). This claim should therefore be deemed procedurally barred.

No basis for excusing the procedural default has been presented in any court by Petitioner. Since the cause and prejudice requirement of *Wainwright* v *Sykes*, 433 US 72 (1977); *Engle* v *Isaac*, 456 US 107 (1982); *Reed* v *Ross*, 468 US 1 (1984); *Murray* v *Carrier*, 477 US ___; 106 S Ct ___; 91 L Ed 2d 397 (1986); *Smith* v *Murray*, ___ US ___; ___ S Ct ___; 92 L Ed 2d 437 (1986), applies to appellate defaults as well as those at trial, Petitioner's procedural default should also bar habeas review of this claim.

It is further important to recognize the Michigan Court of Appeals found that the trial judge was merely giving the jury a "background explanation of murder theory under Michigan law." *People* v *Logan*, No. 23808, p. 2). Since this finding of no error under state law involves only an issue of state law, it should not be cognizable in a federal habeas corpus proceeding. *Combs* v *Tennessee*, 530 F2d 695 (CA 6, 1976).

Finally, notwithstanding the reasons set forth to this point, the district court arrived at the right result by concluding that Petitioner was not prejudiced as a result of the court's explanation of premeditated murder. Essentially, the district

court concluded that the trial court had constructively amended the information by the instruction at issue, thereby depriving Petitioner of defending the charges against him. The district court however, concluded that Petitioner was not prejudiced because his "defense was not compromised by the 'constructive amendment.'"[2] Even more significant is that Petitioner stands convicted of second degree murder as a result of the Michigan Court of Appeals' action. His claim is or should be moot as a result of his accepting the reduction of the verdict to second degree murder, and should not present a basis for habeas relief.[3]

II.

THE REFUSAL OF THE TRIAL COURT TO GIVE A MANSLAUGHTER INSTRUCTION WHERE THE FACTS SHOW THAT THE VICTIM WAS KILLED BY THE PETITIONER WITH A LOADED GUN DURING A PLANNED DELIBERATE ROBBERY DID NOT DEPRIVE PETITIONER OF DUE PROCESS.

Petitioner argues that even though the evidence adduced at trial would support a verdict of felony murder, "there was also evidence which would have supported a jury instruction on the lesser included offense of manslaughter." Petition for Certiorari, p. 17. He cites in support of this claim both his voluntary intoxication and his claim of "imperfect self-defense" which he alleges were raised by him at trial, *Id.*

Petitioner first contends that his voluntary intoxication would provide a basis for instructing the jury on manslaughter. He cites *People* v *Droste*, 160 Mich 66, 79 (1910), to support the claim. *Droste* involved a charge of premeditated murder. Petitioner cites no felony murder case to support his claim. Michigan defines felony murder as second degree murder committed during the perpetration or attempt to perpetrate any of eight separate felonies, including armed robbery. In order for intoxication to be a defense here, it would be necessary for Petitioner to claim he was so intoxicated he was not conscious of what he was doing, or why he was doing it. *People* v *Kelley*, 21 Mich App 612, 622 (1970). Michigan law further recognizes that where a person forms the requisite intent while sober and becomes intoxicated so as to fortify the resolve to commit the crime,

intoxication is not a defense. *Id.* Finally, under Michigan law voluntary intoxication is not a defense to second degree murder. *People* v *Langworthy*, 416 Mich 630 (1982). Petitioner's claim of intoxication does not support a manslaughter theory in this case.

Second, Petitioner misplaces his reliance on *People* v *Springer*, 100 Mich App 418 (1980), through which he claims the theory of "imperfect" self-defense under Michigan law. In *Springer*, the defendant was the initial aggressor and his aggression did not include the display of armed force. Springer's initial aggression was later completely overshadowed by the sudden appearance of two armed men. The facts there showed Springer did not anticipate the escalation of the force which occurred. Hence, the state court found the imperfect self-defense available. In the instant case, Petitioner was not only an armed aggressor, but he and his accomplice each wielded life-threatening weapons to affect a planned robbery. He was properly held responsible for his response to the victim's legal use of retaliating force under Michigan law and not entitled under these facts to any hybrid self-defense theory. *People* v *Podolski*, 332 Mich 508 (1952).

The district court, after reciting the facts as determined in the original appeal, agreed concluding that "the facts before the jury show a planned and deliberate robbery with a loaded gun in the course of which the owner of the Tasty Tim Ice Cream Company was fatally shot by this [Petitioner]." 778 F2d at 283, 284. The district court found that given those facts, the failure to give a manslaughter instruction was at best harmless error which did not prejudice Petitioner. *Chapman* v *California*, 386 US 18 (1967).

Further, in view of Petitioner's own testimony that he knew the victim (T-343, 345), that he

intended to rob the victim's business using the loaded weapon and that (T-352, 353) he shot the victim because:

(Mr. Logan)

"A. He (the deceased) pulled the gun on me and I didn't -- if he would have told me to drop it, I would have dropped it, but he -- I didn't have no choice."

(Prosecuting Attorney)

"Q. What did he tell you? What did Mr. Zerilli tell you?

"A. He didn't tell me anything. He told -- he told Ray to freeze, but he didn't tell me anything.

"Q. He told Ray what?

"A. To freeze.

"Q. What does freeze mean to you to what would it mean to you have heard it?

"A. Stop.

"Q. Freeze is analogous to stop, so what he said to Ray in your presence was stop, wasn't it?

"A. Yes.

"Q. What did you read into that statement that would make you shoot a man because you were in jeopardy that he was going to shoot you?

"A. He said that at the same time that I was right in his line of fire.

"Q. Do you feel that a man has a right to protect his premises with a weapon, Mr. Logan?

"A. Yes.

"Q. And you were on those premises with the intent to rob with an armed rifle, and yet you say to this jury that you shot him in self-defense; is that correct?

"A. If I would have knew he had a gun, I would have not done it.

"Q. But if he did not have a gun, you would have done it, is that correct?

"A. Yes.

"Q. So it was surprise to you that he had a gun?

"A. Yes, he was right on me. I had no choice."

and further that when Petitioner testified on direct examination that:

"A. We shot at the same time, about the same time." (T-344).

this result was proper.

Therefore, upon review of the facts of this case and the applicable state law, there was no evidentiary basis upon which support for the lesser included theory of manslaughter could be predicated. Petitioner was not denied a fair

trial and hence, no due process violation occurred. *Pilon* v *Bordenkircher*, 593 F2d 264, 267 n. 4 (CA 6, 1979), *vacated and remanded on other grounds*, 444 US 1 (1979).

Nor has Petitioner established that the federal constitution requires that a manslaughter instruction be given. Petitioner relies on *Beck* v *Alabama*, 447 US 625 (1980) and *Keeble* v *United States*, 412 US 205 (1973), to establish that the due process clause compels the trial court to instruct on lesser included offenses upon the request of the accused. *Beck* did not so hold. What this Court actually stated in *Beck, supra*. was:

> "While we have never held that a defendant is entitled to a lesser included offense instruction as a matter of due process, the nearly universal acceptance of the rule in both state and federal courts establishes the value to the defendant of this procedural safeguard."

Implicit in the *Beck* decision is the recognition that this "procedural safeguard" does not spring from the federal constitution. Rather, it arises solely from the practice of instructing on lesser included offenses universally employed by both the federal and state courts.

Moreover, both in *Beck* and *Keeble*, the Supreme Court held that this "procedural safeguard" does not entitle the accused to have the jury instructed on every lesser offense he wishes. To the contrary, the rule only encompasses those lesser included offenses rationally supported by the evidence adduced at trial. In footnote 12 of *Beck* this Court specifically noted that this rule

had been adopted in Michigan as well as every jurisdiction which has addressed the issue. From this it is clear that there is no constitutional due process right to instructions on lesser included offenses.

Since manslaughter is not a necessarily included offense within the crime of murder under Michigan law, *People* v *VanWyck*, 402 Mich 226 (1978), and since the evidence does not support a manslaughter theory, Petitioner has not established a valid basis for habeas relief.

Finally, procedural default bars litigation of this claim on habeas relief. The Michigan Court of Appeals in its original opinion, reversed the conviction and remanded this case to the trial court, giving the prosecutor the option to a retrial or to entry of a judgment of second degree murder on the basis of the Michigan Supreme Court's holding in *People* v *Carter*, 395 Mich 434 (1975), which was decided while Petitioner's case was on appeal. Petitioner did not appeal this ruling of the Michigan Court of Appeals to the Michigan Supreme Court. Any issue decided by the Michigan Court of Appeals in that original appeal became the law of the case. *People* v *Whisenant*, 384 Mich 693 (1971). Petitioner then acquiesced in the entry of the reduced second degree murder verdict. This affirmative choice by Petitioner, Respondent submits, forecloses any challenge to the failure to give a manslaughter instruction at trial on procedural grounds.

In Argument I, *infra*, Respondent argues that Petitioner has procedurally defaulted by failing to appeal the original Michigan Court of Appeals ruling and acquiescing in the reduction to second degree murder. The same procedural default should bar this claim from habeas relief absent a showing of cause and prejudice, at which no attempt has

been made. *Wainwright* v *Sykes*, *supra*; *Reed* v *Ross*, *supra*; *Murray* v *Carrier*, *supra*; *Smith* v *Murray*, *supra*. Hence habeas review would properly be denied upon this alternative ground as well.

For all the foregoing reasons, certiorari should be denied upon this claim.

RELIEF

WHEREFORE, for the foregoing reasons the Respondent prays that this Honorable Court deny the Petition for Writ of Certiorari.

Respectfully submitted,

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FOOTNOTES

[1]The record shows there was no objection to the explanation of the elements of premeditated murder at trial. *People* v *Trammel*, 20 Mich App 351 (1976) requires an objection at trial before alleged instructional errors will be considered on appeal absent manifest injustice. Further, the record suggests that this was a strategic choice of counsel. Although Respondent does not pass judgment upon the motives of counsel, requesting that the jury be instructed on premeditated murder and not objecting to an explanation of the elements of premeditated murder (even though the jury would not be instructed that they must or even could consider these elements and base a first degree murder verdict upon a finding of these elements) suggests that confusing the jury or building in error or both was the tactic utilized by Petitioner's counsel. Requiring parties to fulfill the state procedural requirements is one way of preventing the "sandbagging" of issus. See *Wainwright* v *Sykes*, 433 US 72, 89 (1977); *Engle* v *Isaacs*, 456 US 107 (fn 34) (1982).

[2]The Macomb prosecutor relied upon this argument in his brief in the Michigan Court of Appeals (see brief of Macomb County prosecutor, Michigan Court of Appeals No. 59790, page 2), wherein it stated:

> "The People would concur with the statute, the court rule and case law that finality must at some point come to each case. It is unconscienable to continually reopen a case to rehash the same arguments. ... This issue was presented to this Honorable Court over five years ago and no new evidence has been presented to alter this Court's disposition made at that point. *The decision made then,*

acquiesced in and unappealed by the defendant, stands as the law of the case. People v *Drew*, 83 Mich App 57; 268 NW2d 284 (1978). Consequently, the defendant's requst should be denied." (Emphasis added).

[3]The court found that:

"Even if premeditated murder had been included in the indictment, Petitioner could not have done anything differently which would have altered the results of the trial. His intoxication defense was appropriate for rebutting the intent elements of either premeditated or felony murder. This Court notes that in any event there was ample evidence for a conviction on either charge. Thus, Petitioner's third claim constitutes harmless error." (Mem Op II, p. 10).

Thus in view of the overwhelming evidence against Petitioner, the harmless error test of *Chapman* v *California*, 386 US 18 (1967) would govern.